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No. 90-906

In the Supreme Court of the United States

OCTOBER TERM, 1990

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY, ET AL., PETITIONERS

v.

CITIZENS FOR THE ABATEMENT OF AIRCRAFT NOISE, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

TABLE OF AUTHORITIES

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In their brief, respondents attempt to ride two horses at once. First, they argue (Br. 28-33) that the Board of Review is exercising purely *federal* authority and that the constitutionality of the Board must be determined on that basis. But this attempt to defend the rationale of the court of appeals is half-hearted at best; as suggested in our opening brief (at 30), this rationale, if accepted, would call into question the constitutionality not only of the Board of Review but also of the Airports Authority itself and of many other comparable state and multi-state agencies.

Second, respondents argue that even if the Board of Review's authority derives from state law, the

Board's constitutionality cannot be sustained. Br. 33-39. But in doing so, respondents fail to accord sufficient respect to the exercise of state authority, fail to give adequate recognition to the unusual circumstances of this case, and fail to explain how, in these circumstances, the vital principle of separation of powers is threatened or undermined.

1. Respondents make a number of incorrect assertions and arguments about the structure of the Airports Act and about the scope of the Airports Authority's role and powers. First, in support of their argument that the Board of Review exercises federal power, respondents suggest (Br. 30) that the Airports Act "mandates" the creation of the Board. Yet that is precisely what the Act does not do, any more than the Act mandates the creation of an Airports Authority or mandates the execution of a lease of federal property to that Authority. The clear import of the Act is that *if* the legislatures of Virginia and the District of Columbia create an Airports Authority having certain powers, and *if* that Authority's actions in certain respects are subject to review by a Board of Review having certain characteristics, then the Secretary of Transportation *may* enter into a lease containing certain provisions. See 49 U.S.C. App. 2454-2456. Thus, creation of the Board of Review is a condition of the lease, just as a state-created rule on the legal drinking age was a condition of federal aid in *South Dakota* v. *Dole*, 483 U.S. 203 (1987).

Second, respondents err in attempting to attach significance to what they pejoratively characterize (*e.g.*, Br. 14, 30) as a "drop-dead" clause—the provision in Section 2456(h) that, if the Board of Review is unable to carry out its functions by reason of a judicial order, then the actions subject to its

review under the Act may not be performed. This is, purely and simply, a non-severability clause, which makes explicit Congress's intention that the existence of the Board of Review is a condition essential to the exercise of certain powers by the Authority. That Congress regarded the Board as essential in this respect is of no moment in appraising the constitutionality of the Board itself. It goes only to the appropriate remedy in the event that the Board is held to be unconstitutional. See generally *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684-686 (1987); *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234-235 (1932).

Third, in an effort to denigrate the power of the Authority, respondents argue (Br. 34-37) that Congress has "*de facto*" power to remove members of the Board of Review by virtue of its power to relieve those members of their congressional committee assignments, and that the Authority *must* make appointments from the initial lists furnished to it by the Speaker of the House and President pro tempore of the Senate. We believe that neither of these assertions is correct.

With respect to the alleged "*de facto*" removal power, respondents rely almost entirely on the use of the word "consist" in the description of the Board of Review in Section 2456(f)(1). But a reading of the entire section leaves no doubt that the term is used in the context of appointment, and indeed paragraph (f)(2), in describing the terms of Board of Review members, refers to them as "Members * * * *appointed*" under paragraph (f)(1) (emphasis added). Moreover, the use of the term "consist" in this sense is by no means unusual. For example, the statute on the Legal Services Corporation, 42 U.S.C. 2996c(a), refers to the Corporation's Board of Directors as

"consisting of eleven voting members appointed by the President, by and with the advice and consent of the Senate, no more than six of whom shall be of the same political party." Clearly there, as here, the qualifications stated are qualifications for appointment. Whether one who ceases to have these qualifications is subject to removal is a question to be considered in the first instance by the body that has the power of removal. And in this case, for reasons stated in our opening brief (at 31 n.18), we believe that this removal power rests squarely and exclusively with the Airports Authority itself.

With respects to the Airports Authority's discretion to reject all the candidates on an original list, or to ask for a different or expanded list, the statute itself is silent. The Authority has assumed it has that power, even though it chose not to exercise it when the original lists were submitted to it. See J.A. 57; see also J.A. 34-35. And since the power of appointment under the statute plainly does reside in the Authority and not in Congress under Section 2456(f)(1), the most reasonable construction of the statute is that the Authority may insist on a different or expanded list of nominees. Moreover, as with the question of removal, any ambiguities in the statute should be resolved in a way that minimizes or eliminates constitutional difficulties. See, *e.g.*, *Morrison* v. *Olson*, 487 U.S. 654, 682 (1988).

2. Respondents argue (Br. 28-33) that the powers of the Board of Review are "federally retained powers." If respondents were correct that the Board of Review is exercising federal authority, then we would agree that the Board's existence cannot be squared with separation of powers principles or indeed with the specific requirements of bicameralism and presentment, the specific requirements of the Appointment Clause, or the specific prohibitions of the

Incompatibility and Ineligibility Clauses. See Gov't Br. 24-26. But respondents' attempt in this part of their brief to defend not only the result reached by the court below, but also the majority's rationale, is half-hearted and unavailing. As explained in our opening brief (at 29-31), the Authority derives its powers not from Congress but from the joint action of Virginia and the District of Columbia. This is not "federal" power; it is power derived from state and local sources to administer federally leased property pursuant to federal consent. Moreover, respondents never suggest, nor do they even attempt to explain, how the Authority itself (or any comparable state or multi-state agency) could survive constitutional challenge if the court of appeals' rationale is correct. The conditions imposed by Congress in the Airports Act were just as detailed with respect to the Authority as they were with respect to the Board of Review, if not more so. And if the Authority is exercising federal power as a result, presumably all of its members except the one appointed by the President have been named to office in violation of the Appointments Clause.[1]

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[1] Respondents rely heavily on the fact that, in their view, the concept of the Board of Review "originated" in Congress, rather than in Virginia or the District. See, *e.g.*, Br. 29. They do not, however, make clear whether they regard the origin of the concept as constitutionally decisive. If the contention is that constitutional validity turns on who had the idea first, it is a bizarre suggestion—surely the constitutional analysis would not be appreciably different if the Governor of Virginia had suggested the Board of Review, Virginia and the District of Columbia had included it in their original statutes, and Congress had *then* enacted precisely the same Airports Act. And, if respondents' contention is not to that effect, their emphasis on the "origin" of the idea is entirely irrelevant.

Respondents also suggest that the Board functions as an "agent" of Congress. Br. 33-37. This assertion rests, in large

3. Once the underbrush is cleared, the question is properly focused: Whether the exercise of power by joint action of Virginia and the District of Columbia —pursuant to which the Board of Review was established—passes constitutional muster. As respondents acknowledge (Br. 19, 28), it clearly would withstand challenge if the Board of Review had been created by Virginia and the District of Columbia in the absence of a federal statute. The question of constitutionality is posed because the requirement of a Board of Review was included in the Airports Act as a condition of the lease. But in arguing that the Board of Review cannot stand, respondents seriously understate the significance of the unusual circumstances of this case, and thus fail to give any content to the alleged threat to separation of powers principles.

a. Respondents assert (Br. 40) that our emphasis on the special circumstances of this case "lack[s] any constitutional foundation." This assertion puts the shoe on the wrong foot. Since the case involves the exercise of non-federal power in creating the Board of Review, there is no basis for finding a violation of any specific constitutional provision—be it bicameralism, presentment, appointments, incompatibility, or ineligibility. Rather, the question is a different one: whether an arrangement of this sort, which does not violate any specific constitutional prohibition or requirement, offers a device whereby the Legislative

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part, on the mischaracterization of appointment and removal powers (*id.* at 34-37), which is discussed above. If respondents are suggesting that Members of Congress necessarily and automatically serve as agents of Congress because of their status as Members of Congress (*id.* at 33-34), such a contention is flatly inconsistent with the Framers' considered decision that Members of Congress may simultaneously serve in state offices. See Gov't Br. 21-23.

Branch may breach the barriers created by separation of powers principles. This question necessarily requires an examination of the circumstances.

b. We have emphasized in our brief that in this case, several conditions we view as necessary to constitutional validity have been met. Two of those conditions—that the Board has been created by non-federal authority and that the creation of the Authority was not "coerced" by Congress [2]—are not questioned by respondents, at least at this point in their argument. But respondents take issue with the third —that both in form and in substance Members of Congress must serve in their capacity as individuals —and argue that it offers no limiting principle. Br. 39-44. In making this contention, respondents misunderstand both the nature of our argument and its application.

The principal reason why this requirement of individual interest must be satisfied both in form and in substance, as it was here, is that, when the requirement is satisfied, it becomes far more difficult to conclude that the Members are acting as delegates of Congress or that the case involves a threat of "legislative" intrusion into the Executive Branch.[3]

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[2] See *South Dakota* v. *Dole*, 483 U.S. at 211-212; *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937).

[3] Respondents place great weight on certain statements in the legislative history regarding the maintenance of congressional control. Br. 31-32, 42. In addition to the fact that particular remarks in the course of a floor debate should not be the basis for invalidating a statute and that the appropriate focus should be on the structural arrangements created by the statute itself (see Gov't Br. 34-35 n.20), respondents' account of the legislative history selectively ignores evidence supporting the role of Members of Congress as representatives of users. See, *e.g.*, 132 Cong. Rec. 32,143 (1986) (Rep. Hammerschmidt) ("A board of review composed of Con-

The statute and the Authority Bylaws contemplate that the Board of Review will represent the users of the airports (49 U.S.C. App. 2456(f)(1); Pet. App. 151a), and the Members are selected as such. J.A. 45, 47; Pet. App. 175a.[4] Indeed, the Act disqualifies from service on the Board those Members whose home districts are so close to Washington that they are the least likely to be frequent users. 49 U.S.C. App. 2456(f)(1).

Respondents do not seriously rebut our argument that the individuals who serve on the Board of Review have a special and distinctive relationship with the airports, which supports their capacity to serve as representatives of users.[5] Rather, the thrust of re-

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gressmen is created to protect the interests of all users of the two airports."); *id.* at 6069 (Sen. Kassebaum) ("Most Members are intensely interested in the amount of service to and from certain cities, from both National and Dulles."); *id.* at 6070 (Sen. Danforth) ("I think any Senator who has gone through National Airport, and that is all of us in the last week or two, recognizes that something is seriously wrong with that airport.").

[4] Respondents stress that most of the members of the Board of Review are drawn from specified committees. Br. 34, 43. As we explained in our opening brief (at 35 n.20), however, if the service of Members of Congress on the Board of Review as individual users is otherwise valid, the requirement of committee membership is not sufficient to invalidate that role.

[5] Respondents offer only the insubstantial contention that Members of Congress may be unrepresentative because they might not travel to the airports on public transportation, might not have their families with them, and do have reserved congressional parking spaces. Br. 42. In addition to the fact that the first two are speculative, it cannot seriously be maintained that these characteristics are of sufficient weight to disable Members of Congress from serving in the individual capacity specified by the Airports Act and the Authority By-

spondents' argument is that such a relationship may exist in other settings as well. Significantly, respondents devote almost no attention to any specific perceived evil flowing from *this* particular arrangement and concentrate instead on a parade of horribles that will purportedly arise in subsequent cases.[6]

Respondents' effort to minimize the distinctive nature of the individual-capacity-and-representation-of-users characterization is unpersuasive on its own terms. Respondents' examples are inapposite—they involve, for the most part, either situations in which Members of Congress have the same interest as members of the public (such as telephone rates) or those in which Members have a unique interest not shared by the general public at all (such as franking privileges). The singular characteristic of the airports context—which justifies Members' service in their individual capacities and as representatives of users—is that, on the one hand, they use the airports to a far greater degree than members of the general public, but, on the other hand, they share usage of the airports with the general public. Furthermore, and unlike the ex-

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laws. 49 U.S.C. App. 2456(f)(1); Pet. App. 151a. Respondents also seek to rely on the legislative history and the requirement of committee membership (Br. 42-43), but the fallacies of this reliance have been discussed. Notably, respondents attempt to suggest "a more logical approach" for protecting user needs (*id.* at 42), thereby conceding the validity of the goal itself; whether a particular legislative approach is simply wiser or "more logical" than another is, of course, a question of legislative discretion rather than constitutional command.

[6] Thus, in respondents' view, the airports arrangement will provide "a blueprint" (Br. 1), "a roadmap" (*id.* at 19), "no limiting principle" (*id.* at 20), and, again, "a blueprint" (*id.* at 39).

amples given by respondents, this shared but intensive quality of the usage is a predictable and inevitable incident of congressional service. Indeed, as we have noted (Br. 34), the interest of individual Members in traveling to and from legislative sessions is the subject of explicit, constitutional recognition and protection (Art. I, § 6, Cl. 1), a fact ignored by respondents and a characteristic not shared by their examples.

In sum, respondents' efforts notwithstanding, the requirement of service in an individual capacity is both significant in its bearing on the case and limited in its scope.

c. Moreover, it is important to recognize, as respondents quite studiously do not, the novelty of this question of the interplay between state authority and federal separation of powers principles.[7] In these circumstances, well-established principles of judicial restraint warrant that the Court should proceed with caution—that it should avoid broad pronouncements attempting to resolve all the cases that might ever arise and that it should focus on whether the alleged evils actually exist in the case at hand.[8]

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[7] As we explained in our opening brief (at 27 n.15), *Springer* v. *Philippine Islands*, 277 U.S. 189 (1928), which is cited extensively by respondents (Br. 24-25), addresses an entirely different problem—the allocation of authority between branches at the same level of government.

[8] See, *e.g.*, *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 569 (1947) ("[C]onstitutional issues affecting legislation will not be determined * * * in broader terms than are required by the precise facts to which the ruling is to be applied."); *Liverpool, New York & Philadelphia S.S. Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39 (1885) (this Court "is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of

To this end, we have argued that in the present case, there exist not only certain conditions necessary to constitutional validity but also two additional circumstances of obvious significance: (1) that the statute deals not with a matter in which federal presence in both established and expected but with an area of activity where federal involvement is an anomaly; and (2) that the Executive Branch has from the beginning both supported and participated in the development and evolution of the statutory scheme.

Once again, respondents do not deny the existence of these factors; rather, they make a cryptic and unimpressive effort to denigrate them. Thus, on the point that federal ownership and management of commercial airports are anomalous, respondents simply say (Br. 43-44) that other areas of federal involvement were anomalous before the federal government became involved in them. But surely, the question whether the constitutional prerogative of the Executive Branch is threatened is a question influenced by the history and extent of federal concern; here, Congress and the Executive agreed that federal management and operation of these commercial airports was both incongruous and inappropriate. And on the related point of Executive Branch participation in the formulation and implementation of the statutory scheme, respondents come up only with a non sequitur (*id.* at 44): that the lack of Executive Branch objection does not deprive this Court of the authority to decide the issue if it is properly presented. We agree

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the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is applied"). See also *Mistretta* v. *United States*, 488 U.S. 361, 407 (1989).

completely (see Gov't Br. 37), but our point is a more modest one: courts have in the past recognized the significance of the concurrence of the Legislative and Executive Branches on a question involving the separation of powers between them,[9] and this case presents an appropriate occasion for doing so again.[10]

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For the foregoing reasons and those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General *

APRIL 1991

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[9] See, *e.g.*, *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 441, 449 (1977). See also Gov't Br. 37.

[10] We note that respondents incorrectly state that Assistant Attorney General Bolton's analysis of the constitutionality of the Airports Act proposal was "[i]n order to bolster congressional support for the administration's transfer legislation." Br. 8. Respondents may disagree with the Assistant Attorney General's analysis, but there clearly is no basis for attributing ulterior motives to that analysis (which objected to two of the three proposals submitted by Congress), or for concluding that the analysis was anything but a serious, considered, and principled evaluation of the constitutional validity of the proposals. See J.A. 25-35.

* The Solicitor General is disqualified in this case.

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